United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7354

UNITED STATES COURT OF APPEALS

For the Second Circuit.

69 Civ. 442.

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P/S

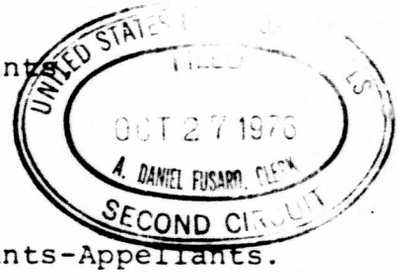
JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IMBRAHIM, Individually and on behalf of the members of the NATIONAL MARITIME UNION OF AMERICA,

Plaintiffs-Appellees,

against

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN SEGAL, ABRAHAM E. FREEDMAN and LEON KARCHMER,

Defendants,



JOSEPH CURRAN, SHANNON WALL,

Defendants-Appellants.

On Appeal From the United States District Court
For the Southern District of New York.

BRIEF FOR DEFENDANTS-APPELLANTS

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Defendants-Appellants.

BRIEF ON BEHALF OF APPELLANTS

PRELIMINARY STATEMENT

This is an appeal from an Order of the United States District Court for the Southern District of New York (Bonsal,J.) denying the application of appellants Curran and Wall to have the attorneys' fees incurred by them in the successful defense of certain portions of this litigation reimbursed by the National Maritime Union. Judge Bonsal's Order which is dated June 30, 1976, is not officially reported but appears at page 78a of the Joint Appendix.

STATEMENT OF THE CASE

The instant litigation has had a lengthy history, having been the subject of several District Court decisions, three appeals to this Court, and several Petitions for Writs of Certiorari.* It is important to the understanding of the instant appeal to state at the outset that the instant application for fees does not relate to the entire litigation, but rather relates only to services rendered during a portion of the litigation in which the applicants Curran and Wall were entirely successful in their defense and were not found to be guilty of any wrongdoing.

This litigation began as a suit challenging the inclusion within the National Maritime Union Officers Pension Plan of certain non-officer employees. Defendants Curran and Wall were the President and Secretary-Treasurer, respectively, of the National Maritime Union, and were sued in that capacity. Defendant William Perry had been employed as the Assistant to the President of the Union and it was contended that, as a

* Morrissey et al v. Curran et al, 302 F. Supp. 32 (S.D.N.Y. 1969), affirmed in part, reversed in part, 423 F. 2d 393 (2nd Cir. 1970), cert. denied, 399 U.S. 928 (1970), on remand, 336 F. Supp. 1107 (S.D.N.Y. 1972), 351 F. Supp. 755 (S.D.N.Y. 1972), affirmed, 483 F. 2d 480 (2nd Cir. 1973), cert denied. 414 U.S. 1128 (1974). Morrissey et al v. Curran et al, 526 F. 2d 121 (2nd Cir. 1975).

non-officer, he could not be covered by the Pension Plan. Defendants Segal, Freedman and Karchmer were made defendants because they were the Trustees of the Pension Plan. In his initial decision, Judge Bonsal held that non-officer employees such as defendant Perry could not properly be provided pensions through the Officer Pension Plan, and directed an accounting and the return by the Pension Plan to the Union of those monies which had been paid to fund pensions for non-officers, see Morrissey et al v. Curran et al, 302 F. Supp. 32 (S.D.N.Y. 1969). This decision was affirmed on appeal, 423 F. 2d 393 (2nd Cir. 1970), cert. denied, 399 U.S. 928 (1970).

Both in the District Court and in the Court of Appeals, defendants Curran and Wall had been represented by union counsel. Plaintiffs had moved in the District Court for an Order enjoining them from being represented by Union counsel but Judge Bonsal had not acted on that motion. On appeal, this Court stated, 423 F. 2d at 400:

> "As the district court apparently did not pass on so much of plaintiffs' motion as requested that defendants be enjoined from retaining counsel paid or to be paid with Union funds, this question should also be determined on remand. The controlling cases on this point are Tucker v. Shaw, supra, and Holdeman v. Sheldon, 311 F. 2d 2 (2nd Cir. 1962), in which we held that all that is necessary for enjoining of the defendants in a §501 action is that the plaintiff make 'a reasonable showing that he is likely to succeed.'"

On remand, Judge Bonsal entered an Order which provided, inter alia:

> "...that the defendants are enjoined from employing counsel paid or to be paid with Union funds;..." (80a)*

Pursuant to this Order, appellants Curran and Wall obtained separate counsel, the firm of Bloom and Epstein. A hearing was held to determine the amount of money that had to be returned by the Pension Plan to the Union, see 336 F. Supp. 1107, following which plaintiffs moved to surcharge the defendants for the pension payment made to various non-officer employees, including defendant Perry.

By Memorandum Opinion filed June 29, 1972, Judge Bonsal denied the Motion to surcharge the defendants with respect to the payments made to non-officer employees of the Union other than Perry, see 351 F. Supp. at 777, but subsequently held, by Opinion dated October 26, 1972, that defendant Freedman should be surcharged for the payment made to Perry. The remaining defendants, including defendants Curran and Wall, were not surcharged, and as to them, the complaint was dismissed. Judge Bonsal stated, 351 F. Supp. at 785:

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* References are to pages in the Joint Appendix.

"However, there is no evidence that on January 16th Curran directed the payment to Perry of $222,200.00 or directed Freedman to furnish the legal opinion to the trusteees. Consequently on the evidence presented, plaintiffs have failed to prove that Curran breached his fiduciary duty under LMRDA. See Richardson v. Tyler, 309 F. Supp. 1020 (N.D. Ill. 1970).

"Wall, Secretary-Treasurer of NMU, knew that plaintiffs had requested NMU to institute action to recover monies attributed to the Officers Pension Plan with respect to non-officers. Indeed, he testified that he brought this to the attention of Curran and the NMU lawyers. However, the evidence establishes that he played no part either in the payment of the $41,250.01 paid to the Officers Pension Plan on December 18, 1968, or in the events of January 16, 1969. Accordingly, there is no basis for finding that Wall breached his fiduciary duty under LMRDA.

"For the foregoing reasons, defendant Freedman is surcharged with respect to the $222,200.00 paid by the Officers Pension Plan to Perry and which has not been repaid. The application to surcharge the defendants, Segal, Karchmer, Curran and Wall, is denied, and the action is dismissed with respect to them." (Emphasis supplied)

It is thus clear that at this point in the litigation, Curran and Wall were successful litigants. However, defendant Freedman appealed the surcharge against him and counsel for plaintiffs cross-appealed from the denial of a variety of relief which they had sought, including, inter alia, the failure to surcharge Curran and Wall for the same amounts for

which defendant Freedman had been surcharged. It is at this point that defendants Curran and Wall retained the firm of Bromsen, Gammerman, Altier and Wayne to represent them on the appeal and it is only for the services subsequent to this date that the instant application for reimbursement of counsel fee relates.

Messrs. Bromsen, Gammerman, Altier and Wayne were successful in representing Messrs. Curran and Wall in plaintiffs' appeal seeking to surcharge them. This Court affirmed Judge Bonsal's dismissal of the complaint as to them stating, 483 F. 2d 480, 485 (2nd Cir. 1973):

> "A. Liability of Curran and Wall for payments to the Pension Fund
>
> The evidence in the record shows that Curran and Wall acted in good faith, relying on the advice of the Union's general counsel. In a matter such as this in which the issue is reasonably open to legal dispute an officer acting in good faith is justified in relying on counsel and is not liable, if he so acts, for breach of trust.
>
> B. Payments by the Pension Fund
>
> The district court said there is no evidence that on January 16th Curran directed the payment to Perry of $222,200 or directed Freedman to furnish the legal opinion to the trustees. Consequently, on the evidence presented, plaintiffs have failed to prove that Curran breached his fiduciary duty under LMRDA.' Morrisey v. Curran, supra, at 785.

"Plaintiffs now argue that Curran dominated the trustees and it was through this power that the payment to Perry was made. This is properly a factual question for the district court which ruled on the basis of all the evidence presented that the plaintiffs failed to prove their contention. There is no reason for believing that the ruling of the district court on this question was clearly erroneous.

"The district court held that the evidence established that Wall played no part in the events of January 16th, and the payment to Perry. There is nothing in the record to indicate that that ruling is incorrect.

"C. Liability of Curran and Wall for payments to Shapiro as trustee

Plaintiffs contend that Curran and Wall are liable for any payments made to Shapiro as trustee. In February, 1972, after the ruling of this court, the Union deposited $460,363 in a bank account under Union control This money was part of the funds paid by the trustees to the NMU to comply with the court order. The Union estimated that this was the amount necessary to fund the pensions for current employees. A trust agreement was drawn up, and Shapiro was named as trustee. Plaintiffs now attack this action.

"Plaintiffs' contentions fail for several reasons. First, the Union never paid the money to Shapiro; the trust agreement was never executed. Even if the money had been paid, the proposed pension plan for current employees was for future payments. Consequently, the establishment of the fund was permissible and not prohibited by this court's prior decision." (Emphasis supplied)

Plaintiffs' Petition for a Writ of Certiorari was denied, 414 U.S. 1128 (1974).

On subsequent remand to the District Court, plaintiffs filed a new motion to hold all the defendants, including defendants Curran and Wall, in contempt because of the payment by the Officers Pension Plan of fees incurred by the defendant Trustees for this defense. This motion was denied by Judge Bonsal, but he did assess a portion of the attorneys' fees incurred by Segal and Karchmer in their own defenses against them, and directed that they repay these amounts to the Pension Plan (82a). Karchmer and Segal appealed from so much of the Order as directed that they pay a portion of their fees, and plaintiffs cross-appealed contending that all of their fees should be charged against them. Even though no fees paid on behalf of defendants Curran and Wall were at issue on the appeal, plaintiffs' counsel made them a party to his appeal. This Court dismissed the appeal as to defendants Curran and Wall as follows, 526 F. 2d 121, 129 (2nd Cir. 1975):

> "Defendants Curran and Wall are parties to this appeal only because they were among those named by plaintiffs in their motion for an order adjudging all defendants in contempt of the district court's July 8, 1970 injunction against defendants' employing counsel at Union expense, the denial of which plaintiffs contest as part of this appeal. We see no basis to disturb Judge Bonsal's decision that none of the defendants was in contempt of his July 8 Order."

On further remand, Messrs. Curran and Wall moved for relief from Judge Bonsal's Order which enjoined the Union from paying their counsel fees so that they could be reinbursed for those attorneys' fees which they incurred (1) in the successful defense of the appeal seeking to surcharge them for the payments made to Perry, (2) in the successful defense of the application to hold them in contempt, and (3) in the successful defense of the appeal from Judge Bonsal's refusal to hold them in contempt. The Union's Constitution authorizes such payment. Article 21, Section 4 of the NMU Constitution provides:

> "Any officer who successfuly defends an action or proceeding directly or indirectly brought against him by a member or members of the Union for alleged acts of misconduct claimed to have been committed during the course of or arising out of his official duties shall be reimbursed by the Union for all expenses, including counsel fees, which he may have incurred in connection with his defense." (Emphasis supplied)(24a)

Notwithstanding this provision in the Union's Constitution, and the fact that the services of Messrs. Bromsen, Gammerman, Altier and Wayne in the foregoing matters were entirely successful and that no verdict was ever awarded against defendants Curran and Wall, Judge Bonsal denied the application, stating only:

> "The long record in this case discloses no basis for finding that Curran and Wall, who were officers of the Union and therefore serving in a fiduciary capacity to its membership under the

> Labor Management Reporting and Disclosure Act (29 U.S.C. §501(a)), should have their attorneys' fees paid by the Union. Indeed the record is clear that they did not maintain the high standard required under Section 501(a) with respect to the Officers Pension Fund." (75a)

It is from the denial of this application for reimbursement of counsel fees that this appeal is brought.

ARGUMENT

POINT I. A Union Official Who Successfully Defends An Action Brought Against Him In His Capacity As A Union Official Is Entitled To Be Reimbursed For His Counsel Fees

It is established law in this Circuit that where suit is brought against an union official under Section 501 of the Labor-Management Reporting and Disclosure Act, 28 U.S.C. §501, the Court may enjoin his being represented by union counsel if the plaintiff makes a reasonable showing of a likelihood of success; however, if the Union official is ultimately successful in his defense, he may be reimbursed by the union for his counsel fees. In Holdeman v. Sheldon, 311 F. 2d 2, 3 (2nd Cir. 1962), this Court stated:

> "We specifically note approval of the Court's suggestion that on motion for injunctions of this sort, the District Court, should after a preliminary hearing if necessary, determine whether the plaintiff has made a reasonable showing that he is likely to succeed, and whether the conduct of the defendants is in conflict with the interests of the Union. This, in combination with a policy of permitting a Union to reimburse a defendant if he is successful in his defense, or perhaps even where his actions were based on a reasonable judgment as to the appropriate procedures and do not evidence bad faith, should provide sufficient financial protection of Union officials against nuisance suits." (Emphasis supplied)

See also Tucker v. Shaw, 378 F. 2d 304, 306, 307 (2nd Cir. 1967).

Where the Union official is successful in his defense, his right to reimbursement for the counsel fees which he incurred is a matter of right and not discretionary. Thus, in Koonce v. Gaier, 320 F. Supp. 1321 (S.D.N.Y., 1971), Judge Weinfeld entered an Order which provided, inter alia, 320 F. Supp. at 1323, 1324:

> "If defendants' position is sustained, or even if it be found that their actions in refusing payment were based on reasonable judgment and were not inspired by bad faith, reimbursement may then be sought out of the union treasury."

While the reimbursement of such counsel fees depends upon the existence of appropriate authority in the union's constitution or by-laws, see Highway Truck Driver and Helpers, Local 107 v. Cohen, 182 F. Supp. 608, 622 (E.D. Pa., 1960), affirmed, 284 F. 2d 162 (3rd Cir.) cert. denied, 365 U.S. 833, the National Maritime Union's Constitution clearly authorizes such reimbursement. See Article 21, Section 4 (24a).

In the instant case, appellants Curran and Wall were entirely successful in their defense. The complaint was dismissed as to them. They were not surcharged. No verdict was ever rendered against them. This alone is sufficient to authorize the reimbursement of their counsel fees.

Even more important, the fees which are the subject of this application were incurred, (1) in connection with an appeal by the plaintiffs after Curran and Wall had been exonerated by the District Court and (2) in connection with

a subsequent effort to hold them in contempt, which was also denied. To now compel them to personally bear the counsel fees in defending these latter proceedings would, we submit, be a gross injustice and completely distort the principle upon which the rule set forth in Holdeman v. Sheldon, supra, is predicated.

To appreciate the injustice of the situation, it is necessary to place this case in its proper context. Plaintiffs had obtained a verdict surcharging trustee Freedman. Freedman was appealing this verdict. The judgment against him was bonded. All the monies that the Union had paid to the Pension Plan to fund pensions for non-officers had been reimbursed to the Union so that the Union had been made whole. There was no logical basis on which defendants Curran or Wall could have been surcharged for the payment made from the Pension Plan to Perry as they had no control over Pension Plan monies. At the same time, Curran and Wall were the incumbent union officers against whom plaintiffs were campaigning in union elections. Plaintiffs did not need Curran and Wall as defendants for "legal" purposes, but they wanted them as defendants for "political" purposes, and since they were going up on appeal anyway, it cost them nothing to include Curran and Wall in their appeal, even though Curran and Wall then had to incur substantial costs in resisting the appeal.

Similarily, in the subsequent proceedings there was no basis on which Curran and Wall could be held in contempt for the payment of counsel fees to trustees Karchmer and Segal because those fees were paid by the Pension Plan and not by the Union. However, again for "political" purposes, and not legal purposes, Curran and Wall were made parties to the motion and to the subsequent appeal. In fact, this Court noted in its last decision, 526 F. 2d at 124:

> "Defendants Curran and Wall are parties to this appeal only because they were among those named by plaintiffs in their motion for an order adjudging all defendants in contempt of the district court's July 8, 1970 injunction..." (Emphasis supplied)

Whether or not plaintiffs' application to surcharge Curran and Wall, and the subsequent application to hold them in contempt, had any merit is not really at issue, since both these applications were denied; however, it is apparent that there can be a real danger of abuse in litigation in which there are several defendants, and the plaintiff chooses to keep proceeding against all of the defendants even though it becomes apparent that only some of the defendants can be held liable. In the context of the bitter contest which characterize intra-union disputes, there would be great temptation to name as a defendant a union officer whom the plaintiff is opposing even though the potential for an ultimate verdict against that officer is minimal. While there appears

to be a growing tendancy to disqualify union counsel from representing union officials in Section 501 suits, this policy of enjoining representation by union counsel should be complimented by a willingness to permit the reimbursement of counsel fees where the union official is successful in his defense.

Finally, Judge Bonsal's statement that "...the record is clear that they (Curran and Wall) did not maintain the high standard required under Section 501(a) with respect to the Officers Pension Fund" (78a) truly misses the mark, because the fees for which reimbursement is being sought were not incurred in connection with any action that Curran or Wall took or could have taken with respect to the Officers Pension Fund, but rather in resisting appeals and efforts to surcharge them after the complaint had been dismissed as to them. This is particularly so with respect to defendant Wall who was not found guilty of any misconduct with respect to any phase of this proceeding, and appears to have been made a party to the action only because he was the incumbent Secretary-Treasurer of the Union. Moreover, this Court found on two occasions that defendant Curran had not engaged in conduct which constituted a breach of his fiduciary duty, see 483 F. 2d at 485, 526 F. 2d at 121. To hold, as Judge Bonsal appears to have held, that union officials may be denied reimbursement for their counsel fees for conduct which falls

short of a breach of fiduciary duty is, we submit, contrary to the rule established in Holdeman v. Sheldon, supra, and, moreover, creates a unworkable situation where union officials will have to incur substantial expense in defense of this type of litigation without knowing they will be reimbursed even if they are successful.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the order below should be reversed and the case remanded with directions to permit defendants Curran and Wall to be reimbursed for the attorneys' fees which they incurred subsequent to October 26, 1972.

Respectfully submitted,

Charles Sovel

Charles Sovel
Attorney for Defendants-Appellants

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

JAMES M. MORRISSEY, et al.,

Plaintiffs-Appellees,

-against-

JOSEPH CURRAN, et al.,

Defendants-Appellants.

----------x

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

CHARLES SOVEL, being duly sworn according to law, deposes and says:

I am an attorney at law duly admitted to practice in the State of New York. On October 27, 1976 I personally served two copies of the Brief for Defendants-Appellants and one copy of the Joint Appendix in the above-captioned matter on Messrs. Duer & Taylor, Esqs., 74 Trinity Place, New York, New York 10006, attorneys for Plaintiffs-Appellees, this being the address designated by said attorneys for the service of papers.

Charles Sovel
CHARLES SOVEL

Sworn to before me this
27th day of October 1976

Gloria Rosengarten

GLORIA ROSENGARTEN
Notary Public, State of New York
No. 30-2381500
Qualified in Nassau County
Cert. filed in New York County
Term Expires March 30, 1977